LIBRARY
SUPREME COURT, U.S.

Office Supreme Court, U.S.
FILED
AUG 9 1962
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 205.

OZARK DAIRY COMPANY et al.,
Petitioners,
vs.
ADAMS DAIRY COMPANY et al.,
Respondents.

REPLY BRIEF OF PETITIONERS.

J. L. LONDON,
SAMUEL B. MURPHY,
506 Olive Street,
St. Louis 1, Missouri,
Attorneys for Petitioners.

COOK, MURPHY & ENGLISH,
506 Olive Street,
St. Louis 1, Missouri,
Of Counsel.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

TABLE OF CASES.

	Page
American Fidelity & Cas. Co. v. All Am. Bus Lines, 190 F. 2d 234	3
Beacon Theatres, Inc. v. Westover, 359 U. S. 500, l. c. 501, 3 L. Ed. 2nd 988, 79 C. J. 948	2, 3
Curry v. Pyramid Life Ins. Co., etc., 271 F. 2d	1
Moore et ux. v. United States, 196 F. 2d 906	3
Roth v. Hyer, C. A. 5, 1944, 142 F. 2d 227	3, 4

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. .....

OZARK DAIRY COMPANY et al.,
Petitioners,

vs.

ADAMS DAIRY COMPANY et al.,
Respondents.

REPLY BRIEF OF PETITIONERS.

Petitioners desire to reply very briefly to the argument advanced in the brief by the respondents. The respondents have failed to answer the basic argument raised by the petitioners. The respondents state a conclusion that no important question of federal law was decided below and argue that an antitrust suit should be tried first to determine whether or not the parties are entitled to a jury trial. Such a procedure would defeat the very purpose of a mandamus proceeding to determine the right of the parties to a jury trial. If the argument of the respondents is followed to a conclusion, either party, or the court,

could obviate the right to a jury trial by simply setting aside an amendment which may have been made to one of the pleadings (albeit an important and substantial amendment). It follows therefore that the question involved is a most important one since amendments are every-day occurrences and the question arises frequently as to the right to trial by jury upon an amendment. We make bold to state and contend that irrespective of whether an amendment, such as the one in the case at bar, is withdrawn at the request of the amending party or by the court on its own initiative, that the fact remains that such procedure cannot alter the rights of the party whose rights have already attached.

The respondents have overlooked the point that the respondent, National Dairy Products Corporation, may not be in the case at the time of trial, and therefore the answer filed by this respondent would not be in the case.

Cases Cited by Respondents Are Not Applicable.

Curry v. Pyramid Life Ins. Co., etc., 271 F. 2d, page 1, was a case in which an insuror on a life insurance policy in its answer set up the affirmative defense of fraud and set up a counterclaim against the beneficiary. The beneficiary filed a reply to the counterclaim and the court held that this was the last pleading directed to the fraud issue and the beneficiary's request for a jury trial filed on the same date as the reply was timely. The court held in that case that a reply was required to the counterclaim and that this was the final pleading required or permitted. In this case, the court held that her reply, wherein she denied the fraud allegations, was the last pleading directed to such issue, hence the court argued that it must follow that her application for a jury trial was seasonably made (citing cases). The court cites with approval the case of **Beacon Theatres, Inc. v. Westover**, 359 U. S. 500 l. c.

501; 3 L. Ed. 2nd 988; 79 S. C. 948, already quoted from on page 9 of the Petition for the Writ of Certiorari. How does the Curry case, supra, help respondents?

In the case of **American Fidelity & Cas. Co. v. All Am. Bus Lines**, 190 F. 2d 234, relied on by the respondents, the court points out that the issue of bad faith on the part of the insurance company in rejecting the offer of a settlement of the action pending in the state court was squarely joined on the face of the original complaint and the original answer. The substitution of another party as the plaintiff did not change in any manner that issue or any other issue in the case. Obviously, here the facts likewise were different and do not control the present situation.

The respondents also rely upon the case of **Roth v. Hyer**, C. A. 5, 1944, 142 F. 2d 227. There is no similiarity in that case with the case at bar. In that case, the case had been tried, reversed and remanded. The suit was one at law for breach of a contract. After the case was reversed and remanded, the **defendants** offered an amendment to their answer, it being principally a denial of the authority in the attorneys who purported to settle the claim and they filed a demand for a jury trial. In other words, the **defendants in that case** offered to file an amended answer and then demand a jury trial. The situation was just the opposite of that in the case at bar, where the defendants filed amended answers raising a new issue as to each of them and the **plaintiffs** filed the demand for a jury trial.

In the case of **Moore et ux v. United States**, 196 F. 2d 906, also cited and relied on by respondents, this was a suit by the United States against one named Moore and his wife for injunctive relief and damages in relation to over-charges for rent. The case had gone to trial for rent violations before the court without a jury. No jury trial

was demanded until after remand of the case by the appellate court. Here again the amendment was made by the **defendants** who sought to allege in their amendment that the violations were not wilful, **which was already an issue in the case.** In fact, the court held, l. c. 908, that no demand for a jury trial as of right under Rule 38 had ever been made. In other words, the court merely held the general rule that the right to a jury trial when once waived cannot be revived by a belated amendment of pleadings attaching the same general issues, citing the Roth case, *supra.* By denying that the violations were wilful, the court simply held that that issue was in the first trial because the complaint prayed for three times all-over charges made.

We have no desire to re-argue the point made in the original petition that mandamus is the proper remedy and that neither the parties nor the court has a right to deny the petitioners' demand for a jury trial if and when that right arises. If it arose when all of the defendants other than the National Dairy Products Company sought to inject a new issue into the case through amendments in their answers, petitioners earnestly insist that the right to a jury trial arose at that time and the court had no power or right to deprive them of a jury trial through the device of setting aside the amendments.

The respondents have not answered the argument on page 10 of the original petition that the ruling of the Court of Appeals for the Eighth Circuit is in conflict with that of the Third Circuit, which decided the Canister case which we contend is squarely in point on the question as to what right accrues where an amended pleading is filed under Rule 38.

We recognize that the respondents are represented by able and outstanding counsel. Nevertheless, we submit

that they have not effectively answered the arguments set out in the briefs filed by the petitioners for the obvious reason that the petitioners are entitled to a jury trial under the facts and the law, as provided by Rule 38 of the Federal Rules of Civil Procedure.

For the reasons set out in the petitioners' original petition and in this reply brief, petitioners pray the Court that the ruling of the Court of Appeals be reversed.

Respectfully submitted,

.....

J. L. LONDON,

.....

SAMUEL B. MURPHY,
506 Olive Street,
Suite 1711,
St. Louis 1, Missouri,
MAin 1-1462,
Attorneys for Petitioners.

.....

COOK, MURPHY & ENGLISH,
506 Olive Street,
St. Louis 1, Missouri,
Of Counsel.